No. 3017

IN THE

United States Circuit Court of Appeals

For the Ninth Circuit

ALEXANDER GLADSTONE, alias William Vines,
Plaintiff in Error,

vs.

THE UNITED STATES OF AMERICA,
Defendant in Error.

PETITION OF PLAINTIFF IN ERROR FOR A REHEARING.

Upon Writ of Error to the United States District Court of the Southern District of California, Southern Division.

BENJAMIN L. MCKINLEY,
Humboldt Bank Building, San Francisco,
Attorney for Plaintiff in Error and Petitioner.

FILED

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To the Honorable William B. Gilbert, Presiding Judge, and the Associate Judges of the United States Circuit Court of Appeals for the Ninth Circuit:

Now comes Alexander Gladstone, the plaintiff in error in the above entitled cause, and respectfully petitions your Honorable Court for a rehearing in the above entitled cause for the following reasons:

I.

In deciding adversely upon the first assignment of error of plaintiff in error, namely, that the

Court erred in denying motion for a continuance of the trial for the purpose of submitting to the President of the United States an application for executive clemency on behalf of plaintiff in error, the Court seem to take the view, in the first place, that the evidence adduced upon the trial shows that plaintiff in error was the principal offender, and that therefore his full disclosure to the Collector of Customs at Los Angeles of all the facts within his knowledge concerning the opium which was in question in this case, did not give him an equitable right to clemency. We most respectfully submit that in our humble judgment the evidence ought not to be given this construction.

It appears (page 53 and page 56, Transcript of Record) that besides Gladstone and his co-defendant, Friedlander, there were two other men in the automobile with them. It further appears that neither Gladstone nor Friedlander had any keys either to the suit case or to the black box containing the opium, which were found in the automobile (page 54, Transcript of Record). One of the other two men, named "George," was the driver of the machine (page 56, Transcript of Record). When the question was asked by the Deputy Sheriff, "Where are the grips?" it was George who answered his question (page 56, Transcript of Record). The witness Rynning, the Deputy Sheriff, testified (page 57, Transcript of Record) that he tried every key in the pocket of Gladstone or Vines, and they did not fit the grips. He also searched Fullerton, but did not search George at

all (page 57, Transcript of Record). George was not produced as a witness on the trial and no reason was given for his failure to appear. Fullerton was the owner of the car (page 71, Transcript of Record), but George drove it. In view of these facts, and in view of the further fact that Fullerton admits (page 7, Transcript of Record) that he had been convicted of a felony in this state, and also prior to coming to this state, which would render him incompetent to be a witness, we respectfully submit to the Court that we do not believe it can be correctly said that the evidence in the Court below discloses that Gladstone himself was the principal offender. We submit, in all sincerity, that the testimony, together with the fact of Mr. George's unexplained absence, tends just as strongly to show that he was guilty of the offense charged against Gladstone as it tends to show Gladstone's guilt; and that there was just as much reason for the arrest and trial of Mr. Fullerton upon this charge as there was for the arrest and trial of Mr. Gladstone. The fact that the statement made by Gladstone was not placed in the record or used against him, we most respectfully submit, could not alter the situation. The uncontradicted testimony shows that the statement was given in good faith; it is not denied that it is a full one, and it is not denied that it is a true one. The statement itself was in the custody of the prosecution, and not accessible to the counsel who defended Gladstone in the Court below, and there-

fore could not have been placed in the record by them.

In view of the testimony brought out at the trial, and particularly upon the points above referred to, we respectfully contend that it ought not to be assumed that the statement showed that Gladstone was himself the principal offender, and that nobody else was implicated by him. George and Fullerton, and particularly George, had many things to explain which George in particular did not attempt to explain as he did not appear as a witness, and we earnestly hope that the Court, upon rehearing may decide that the officers of the Government, having induced the plaintiff in error, Gladstone, to make a full disclosure upon a definite promise, should be required scrupulously and exactly to keep the promise which they made him, especially as he fulfilled his part of the transaction in good faith.

The Court in the opinion in this case make the point that "the plaintiff in error was given ample opportunity to apply for pardon between the date of the indictment and the trial, which occurred eight months later." In response to this suggestion, we respectfully submit that there was no reason why the defendant should make such an application previous to the calling of the case for trial. He had a right to rely upon the promise which was made him, and it was only when he knew that the promise would not be kept that he could, with any show of reason, ask the Court for time within

which to present his application to the executive authority.

II.

With reference to the second assignment of error, namely, that the Court permitted a question of a witness for the prosecution as to a conversation had with plaintiff in error and his co-defendant before the corpus delicti had been established, this Court in its opinion say that the order in which testimony shall be admitted is largely within the discretion of the trial Court, and while it may be preferable to prove the corpus delicti before offering evidence to implicate the accused, it is not error to receive evidence against the accused before the corpus delicti has been proved. We certainly do not and could not dispute the absolute correctness of this statement as a proposition of law. In fact, as we say in our brief, page 16, "it is ordinarily quite true that the order of proof is a matter which is within the discretion of the Court"; but we then continue (Brief of Plaintiff in Error, page 16) to state our position as follows: "but the objection raised in this case, to this question, and to other questions along the same line, becomes of considerable importance in view of the fact that the corpus delicti, which was the unlawful possession of unlawfully imported opium, was never proved at all." The discussion of the evidence on pages 16 to 21, and pages 21 to 36 of our brief was quite full, and it is not our inten-

tion, in this petition, to burden the Court with a repetition of what was there said. We may say, however, that the discussion of this point necessarily involves a discussion of the constitutionality of Section 3 of the Act of Congress of January 17, 1914, 38 Stat. L., page 275, for the reason that it is provided by that section

> "that on and after July 1, 1913, all smoking opium or opium prepared for smoking found within the United States, shall be presumed to have been imported after the first day of April, 1909, and the burden of proof shall be on the claimant or the accused to rebut such presumption."

Our contention is that there is no proof whatever outside of the presumption contained in this section, that the opium in question was imported into the United States at all, either from Mexico or from any other place, and the unlawful possession of unlawfully imported smoking opium was the corpus delicti which was required to be proved in this case before any testimony as to conversations or admissions could be received. Our position then, is, not that the Court might not receive evidence of conversations and declarations, in the exercise of its sound discretion, prior to the proof of the corpus delicti, but that, in a case like the present, where, as we respectfully insist, there was no proof whatever of the corpus delicti, the admission of the conversation in question was clearly error. We respectfully call attention, in this connection, to the following statement made by the Court in its opinion on page 3 of the typewritten

opinion of the Court in this case on file in the office of the Clerk:

> "On the trial it was shown that the plaintiff in error, accompanied by Friedlander, went in an automobile from San Diego to El Centro, Mexico, taking with him two empty suit cases, and that on returning to California he was arrested while in possession of the suit cases which were filled with opium prepared for smoking."

We think that the Court will agree, on reviewing the evidence, that there is not a particle of testimony to the effect that El Centro is in the Republic of Mexico, or that this automobile, or any of the parties in it, were ever out of the boundaries of the State of California. The town of El Centro is referred to on page 53, Transcript of Record by Deputy Sheriff Rynning, when he states that he received a telegram from the Sheriff at El Centro. Again on page 65, in the testimony of D. J. Davidson, he states that he was the manager of a hotel at El Centro, but nowhere states that this place is in the Republic of Mexico. The town is again mentioned on page 66 of the Transcript of Record, and again it does no appear that it is in the Republic of Mexico. It is again mentioned on page 69, Transcript of Record in the testimony of L. R. Fullerton, but its location is not given. The same is true on page 70, of the Transcript of Record and again on page 76. The co-defendant, Morris Friedlander, again mentions El Centro on pages 78, 80, 82, 83 and 84 of the Transcript of Record, and again it does not appear

that the town was outside the limits of the State of California. We presume that the Court will take judicial notice of the fact that there is a town called El Centro within the State of California, and that it is the County Seat of Imperial County in this state. Under the circumstances we feel certain that the Court will not presume that the place called El Centro, which was visited by plaintiff in error, was situated in the Republic of Mexico, and will not presume that he was out of the State of California.

III.

With reference to the third assignment of error, namely, the insufficiency of the evidence to justify a conviction and the unconstitutionality of the Act of January 17, 1914, we submit that, notwithstanding the fact that, as stated by the Court in its opinion, no request for an instructed verdict appears in the Transcript, and no exception appears to have been taken to any of the instructions or to the denial of any requested instruction, the decision of this question, namely, the constitutionality of the section in question, is necessarily involved in the second assignment of error just discussed, and we further respectfully submit that, in any event, it would be within the jurisdiction of this Court in its sound discretion under Subdivision 4 of Rule 24 to notice a plain error not assigned or specified. In this connection also we desire again

to call to the attention of the Court our discussion contained on pages 21 to 26 inclusive of the Brief of Plaintiff in Error, and in particular to the cases cited on page 34 and 35 of our Brief, in which the point is made that the presumption provided for by Section 3 of the Act of January 17, 1914, is not the ordinary presumption of fact which is an immediate inference from facts proved, and which is recognized by the law, but a presumption founded and based upon another presumption, or an inference from an inference, which the law does not permit.

An examination of the opinion of the Court in the case of *Ng Choy Fong v. United States,* 245 Fed. 305, cited in the Court's opinion in this case, will show that this last point was not called to the Court's attention and was not considered in the decision of that case. We again most earnestly and most respectfully urge it upon the attention of the Court upon this petition for rehearing.

Wherefore, your petitioner, plaintiff in error herein, respectfully prays that he be granted a rehearing in this case by this Honorable Court, and that the judgment against him be reversed.

Dated, San Francisco,
February 25, 1918.

BENJAMIN L. MCKINLEY,
Attorney for Plaintiff in Error and Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am counsel for plaintiff in error and petitioner in the above entitled cause and that in my judgment the foregoing petition for a rehearing is well founded in point of law as well as in fact and that said petition is not interposed for delay.

BENJAMIN L. MCKINLEY,
Counsel for Plaintiff in Error and Petitioner.